No. 95-1423

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MARIE E. CULLY,

Petitioner,

vs.

ST. AUGUSTINE MANOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court properly enters summary judgment where a plaintiff fails to present a *prima facie* case of retaliatory discharge.

RULE 29.6 STATEMENT

Catholic Charities Corporation, erroneously named as Catholic Charities of Cleveland, has no parent corporation nor does it have any subsidiary which is not wholly-owned.

St. Augustine Manor, erroneously named as St. Augustine Manor Corp, is a wholly owned subsidiary of St. Augustine Corporation.

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Respondents, St. Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland, hereby oppose the Petition for a Writ of Certiorari filed by Marie E. Cully.

The petitioner argues not for defining or modifying the standard articulated for determining when and under what circumstances summary judgment is appropriate in an action brought pursuant to Title 42 U.S.C. § 2000 *et seq.* Rather, she merely posits that established law was improperly applied in her case.

Moreover, no special or important reasons exist for exercising this Court's judicial discretion to review this matter. To the contrary, accepting this case for certiorari review would serve only to squander this Court's limited time and resources.

RELEVANT STATUTES

While petitioner cites "28 USC §2000e 3(a)" and "28 USC 2000e5(f)", it appears clear that Ms. Cully intends to predicate her arguments on 42 U.S.C. § 2000, *et. seq.*

42 U.S.C. § 2000e-3(a) provides, in pertinent part:

> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, these respondents provide the following clarifications and corrections to the petitioner's statement of the facts and law applicable thereto, which clarifications and corrections are supported by the evidence of record submitted in the trial court.

Respondents, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland, are both separate and distinguishable organizational entities. Neither has participated in the day-to-day business operations of any of the other respondents nor has either exercised any operational direction or control over those other respondents. Barring litigation, neither Catholic Charities of Cleveland nor the Catholic Diocese of Cleveland has had any contact or relationship with the petitioner, Marie E. Cully.

Respondent, St. Alexis Hospital, is also a separate and distinct organizational entity. No connection or interrelationship exists between St. Alexis Hospital and Catholic Charities of Cleveland, the Catholic Diocese of Cleveland, St. Augustine Manor and/or St. Augustine Manor Corporation.

St. Augustine Manor, is owned and operated by St. Augustine Manor Corporation (collectively referenced hereinafter as "St. Augustine"), and is engaged in the provision of health care services. On June 21, 1987, St. Augustine established an employment relationship with the petitioner, Marie E. Cully. Ms. Cully was retained as an employee-at-will, no oral or written contractual agreement having been made by

the parties to the effect either that she would be employed for any specific term or that her status at St. Augustine Manor was anything other than that of an at-will employee.

At the time St. Augustine administrators hired Marie E. Cully, they were aware of the series of lawsuits against her previous employers which Ms. Cully had asserted in the civil court system and of the numerous claims against those previous employers which she had pursued with the Equal Employment Opportunity Commission. St. Augustine made no comment on Ms. Cully's pending civil rights claims, took no position on the merits of her allegations, expended no efforts to follow the progression of those proceedings and had no interest in the outcome of those actions. At no time during the nearly five year employment period was retaliatory or harassing action taken by any individual acting on behalf of St. Augustine in recompense for Ms. Cully's assertion of her constitutional rights.

On April 29, 1992, Marie Cully's department supervisor, Thomas F. Dagg, reported a neglect of duty, policy or procedure and failure to maintain work standards on Ms. Cully's part. Because the April 29, 1992, offense was the latest in a string of Personnel Policy violations throughout the course of her employment, Marie E. Cully was terminated from St. Augustine Manor on that date.

Subsequently, Ms. Cully filed suit against St. Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland, The Catholic Diocese of Cleveland and St. Alexis Hospital, alleging 1) wrongful discharge; 2) retaliatory discharge; 3) sexual harassment and sexual discrimination; 4) intentional infliction of emotional distress; and 5) conspiracy. Saint Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland and The Catholic Diocese of Cleveland filed separate answers, denying each of the

petitioner's substantive allegations and asserting numerous available affirmative defenses.

Because the petitioner had predicated her claims against Catholic Charities of Cleveland and The Catholic Diocese of Cleveland on the mistaken assumption that these entities are "substantially identical to" or control St. Augustine Manor, those respondents filed separate Motions to Dismiss on the basis that at no time was Ms. Marie Cully ever employed by either entity nor did either of those organizations at any time exercise operational control over St. Augustine Manor. The trial court treated those Motions to Dismiss as Motions for Summary Judgment, granting both.

St. Augustine Manor and St. Augustine Manor Corporation filed a joint Motion for Summary Judgment on the basis that: 1) Marie E. Cully was an employee at-will, terminable at the discretion of St. Augustine Manor; 2) Marie E. Cully had failed to set forth a *prima facie* case for her alleged retaliatory discharge, sexual harassment or sexual discrimination, intentional infliction of emotional distress or conspiracy claims; and 3) Marie E. Cully's claims for sexual discrimination and sexual harassment were time-barred by the statute of limitations. The trial court determined to grant that Motion for Summary Judgment.

The petitioner appealed the trial court's decisions entering summary judgment in favor of Catholic Diocese of Cleveland, Catholic Charities of Cleveland, St. Augustine Manor Corporation and St. Augustine Manor. The matter having been briefed and orally argued, the Court of Appeals overruled each assignment of error raised by Ms. Cully, affirming summary judgment for all respondents. Petitioner appealed further to the Supreme Court of Ohio which declined to exercise jurisdiction.

Marie E. Cully now petitions for certiorari, for purposes of these respondents, asking this Court to evaluate whether her termination from St. Augustine was wrongful. While she cites "28 USC §2000e 3(a)" and "28 USC 2000e-5(f)", it appears clear that she intends to predicate her arguments on 42 U.S.C. § 2000, *et seq*. Regardless, none of these authorities provide any basis for reversal of the decisions below.

REASONS FOR DENYING THE WRIT

No unique factual circumstances are presented in this case, nor does the petitioner raise any novel legal arguments to alter the application of the unambiguous, controlling law which governed resolution of this matter in the courts below. As a matter of law, the trial court properly granted summary judgment in favor of St. Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland, which decisions were properly affirmed in the Court of Appeals.

While Marie E. Cully asserted numerous claims against these respondents in her Amended Complaint, she petitions this Court for certiorari review on the basis that summary judgment was improperly granted below on her wrongful/retaliatory discharge claims asserted pursuant to "Title VII", 42 U.S.C. § 2000e. However, as that law is drafted, interpreted and applied, the petitioner cannot establish any genuine issue of material fact with respect to her entitlement to recover thereunder.

I.

PETITIONER, MARIE E. CULLY, CANNOT ESTABLISH A *PRIMA FACIE* CASE FOR WRONGFUL OR RETALIATORY DISCHARGE.

Marie E. Cully alleges that she was placed on probation, suspended and later terminated for three retaliatory reasons: her pursuit of EEOC claims against three hospitals, none of which has any affiliation with any of these respondents; her complaints of sexual harassment vocalized to a St. Augustine Manor administrator long before the date of her discharge; and her criticism of racial discrimination allegedly perpetrated by respondent, St. Alexis Hospital, against its patients. Aside from the fact that her allegations defy logic, as a matter of law, the petitioner cannot establish a *prima facie* case to maintain a cause of action for wrongful or retaliatory discharge.

To establish a claim of retaliatory discharge under Title VII, petitioner Cully must show by a preponderance of the evidence that 1) she engaged in a protected activity as an employee, 2) she was subsequently discharged from employment, and 3) there existed a causal connection between the protected activity and the discharge. *See, e.g., Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9 (1st Cir. 1994). The petitioner cites no case law inconsistent with this authority.

Application of *Hochstadt v. Worcester Found. for Experimental Biology, Inc.*, the District Court case relied upon by Marie E. Cully, establishes that she has failed to set forth a *prima facie* case for retaliatory discharge. 425 F. Supp. 318 (D. Mass 1976). That decision stands for the proposition that, in order to establish a causal connection between an employee's participation in a protected activity and her subsequent discharge, that employee must show either evidence tending to

establish a retaliatory motivation on the part of her employer or that her discharge followed her participation in a protected activity within such period of time that the court might infer retaliatory motivation. The instant petitioner can show neither.

Marie E. Cully has produced no evidence of any retaliatory motivation on the part of any of these respondents. The petitioner's conclusory accusations lack the concrete documentation necessary to prove a causal link between protected activity and retaliatory treatment. As one court has stated:

> [e]ven in discriminatory discharge cases, where the plaintiff can rarely present direct, subjective evidence of an employer's actual motive, the plaintiff cannot survive summary judgment with "unsupported allegations and speculations," but rather must "point to specific facts detailed in affidavits and depositions — that is, names, dates, incidents, and supporting testimony — giving rise to an inference of discriminatory animus."

Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc., 31 F.3d 9 (1st Cir. 1994), citing *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

The protected activities in which the petitioner was engaged consisted of prosecution of administrative and legal civil rights claims against third party entities. None of these respondents has or had any interest in or affiliation with any of Ms. Cully's former employers, including respondent, St. Alexis Hospital. As a testament to these respondents' complete indifference to the petitioner's assertion of her constitutional rights against her

former employers, St. Augustine Manor hired her with full knowledge of these civil rights claims and retained her for nearly five years during which time she continued to pursue those actions.

Nor can Marie E. Cully establish that her discharge followed her protected activities within such period of time that the court might infer retaliatory motivation. The petitioner had initiated her protected activities prior to the time when she began working for St. Augustine Manor, which activities continued during the entire course of her tenure of employment. Given that St. Augustine Manor was aware of the petitioner's participation in protected activities for five years before it discharged her, no inference of retaliatory motivation may be drawn.

The petitioner posits that a causal "nexus" exists between her protected conduct and her termination because "her opposition to her previous firing persisted throughout her entire employment at St. Augustine." (Petition at p. 6). She further argues that, even if the causal connection is weak between her EEOC charge or suit against St. Alexis and her subsequent termination, the fact that she routinely complained of having been retaliated against by St. Augustine constituted a protected activity which occurred sufficiently close in time to her firing. Neither contention has merit.

Marie E. Cully argues that she was subjected to a "continuing course of discrimination", which had a "close time nexus to discharge". (Petition p. 10). As a factual matter, the record evidences no such "continuing course of discrimination".[1] Regardless, the petitioner's attempt to

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1. A comprehensive list of St. Augustine Manor's allegedly discriminatory conduct includes: assigning a workload impossible to complete within the required time, requiring her to work after "punching out"

(Cont'd)

establish the requisite causal connection by noting that her termination followed six weeks after her last internal complaint of alleged retaliation fails as a matter of law. Her own testimony establishes that she made numerous, repeated internal complaints of alleged retaliation, none of which previous internal complaints resulted in termination. Clearly, were St. Augustine Manor inclined to terminate Ms. Cully in retaliation for her prosecution of her constitutional rights, which rights she asserted forcefully and consistently during the course of her employment, it would have done so before five years had passed.

Marie E. Cully rejects this obvious reality, opining that:

> an employer can maximize the benefit of its retaliation if it can continue it throughout the administrative and judicial resolution of the protected activity. Particularly where the employee is a pro se lay person at law, this can effectively sap her time and energy so that she is diverted from her complaint.

(Cont'd)

and during her lunch break; delaying performance reviews, requiring her to work shifts which caused her transportation problems; exposing her to harmful chemicals; denying her access to an equipment operating manual; falsely accusing her of mental incapacity to work and later suspending her for that reason; encouraging her to take actions dangerous to the health and safety of patients; interfering with the receipt of mail at her residence; and threatening to require her to take action which could have resulted in the loss of her respiratory therapy license. She further alleges that one St. Augustine supervisor repeatedly made contact with her breasts, disparaged another employee and made derogatory reports of her work, which reports were kept on file by St. Augustine Manor. These respondents deny the veracity of each of these allegations. However, even assuming, *arguendo*, these alleged violations to have occurred, none evidences discriminatory conduct or any pattern of retaliation for Ms. Cully's prosecution of civil rights actions against third party entities.

(Petition p. 11.) Aside from the fact that her argument lacks any foundation in logic, it illustrates the Hobson's choice which she would present to these respondents; by the petitioner's reasoning, St. Augustine Manor was wrong to terminate her and wrong to retain her.

As the trial and appellate court opinions demonstrate, the petitioner's failure to present a *prima facie* case of retaliatory discharge was fatal to her case.

II.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THESE RESPONDENTS, WHICH DECISION THE COURT OF APPEALS PROPERLY AFFIRMED.

Summary judgment is appropriate when the evidence offered demonstrates that there is no genuine issue of material fact in dispute and no jury could reasonably find by a preponderance of the evidence that the non-moving party is entitled to judgment in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The moving party bears the burden of demonstrating a lack of a genuine issue of fact. If the nonmoving party fails to make a sufficient showing of an essential element of his or her case with respect to which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

These respondents concede that Marie E. Cully, in pursuing equal employment claims against her former employers, was engaged in a protected activity. These respondents also concede that Marie E. Cully was discharged from the employment of St. Augustine Manor. However, the petitioner has utterly failed to present sufficient evidence of a causal connection between her

protected activity and the discharge which followed it five years later. Outside of the self-serving accusations set forth in her Affidavit, the petitioner failed to present any evidence which would justify even a circumstantial inference that she was discharged for a retaliatory or discriminatory reason.

In arguing that her Affidavit, in which she negates St. Augustine's explanation for her termination, suffices to create a genuine issue of material fact, the petitioner misreads the very authority upon which she relies. *See Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981); *Hochstadt v. Worcester Found. for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976). Both of those authorities stand for the proposition that only after an employee establishes a *prima facie* case for retaliatory discharge does the burden of proof shift to the employer to advance a non-retaliatory motivation for its decision. Because Marie E. Cully failed to establish a causal connection between her participation in a protected activity and her discharge, these respondents never assumed the burden of proving the legitimacy of her discharge.

Moreover, "evidence contesting the factual underpinnings of the reasons for the [employment decision] proffered by the employer is insufficient, without more, to present a jury question." *Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9 (1st Cir. 1994), citing *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 194 (1st Cir. 1990). Cully cannot establish that St. Augustine's reasons for discharging her were merely a pretext for impermissible retaliation solely by contesting the objective veracity of the respondent's action. *Id.*

To defeat a motion for summary judgment, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242 (1986). As applied to the instant case, there is insufficient evidence from which a reasonable jury could find that St. Augustine terminated its employment relationship with Marie E. Cully for any impermissible reason.

Marie E. Cully having failed to establish a causal connection between her protected activity and her discharge, which causal connection constitutes an essential element of a Title VII cause of action, the trial court properly granted summary judgment in favor of these respondents, which decision was properly affirmed by the Court of Appeals.

III.

NO COMPELLING ISSUES COUNSEL FOR REVIEW OF THIS CASE.

The considerations governing review on writ of certiorari enumerated in Supreme Court Rule 10 establish that the instant case lacks the appropriate character to command this Court's review. The state courts below did not adjudicate the petitioner's federal claims inconsistently with any decision of another state court of last resort or of a United States court of appeals. Nor do the lower court decisions in any way conflict with any decision of this Court.

While the petitioner attempts to outline a conflict among federal Circuit Courts regarding whether, in the absence of proof of an employer's discriminatory motivation, the insufficiency of an employer's reason for termination can forestall summary judgment, no such conflict exists. (Petition pp. 13-14). Any inconsistency of outcome between *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), *reh'g en banc granted*, 49 F.3d 127 (5th Cir. 1995), and *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed*, February 28, 1996, reflects simply

divergent fact patterns and divergent determinations with respect to whether the plaintiff had established a *prima facie* case under Title VII. In *Rhodes*, the court found no evidence or testimony which showed any connection between the plaintiff's age and the defendant's decision to terminate his employment. Therefore, summary judgment in favor of the defendant was entered. In *Barbour*, the plaintiff successfully set forth a *prima facie* case for racial discrimination. Therefore, summary judgment in favor of the defendant was denied. These cases evidence no conflict among the Circuit Courts relevant to the issues *sub judice*.

Moreover, the federal law at issue is clear. No ambiguity in statutory draftsmanship or judicial interpretation warrants intervention by this Court. The Petition submitted by Ms. Cully reveals that she argues not for defining or modifying the summary judgment standard utilized in the Title VII context. Rather, she merely posits that established law was applied improperly in her case. This Court has articulated the order and allocation of proof in Title VII suits. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978).

The instant case presents no unique factual circumstances which would justify clarifying or modifying the law which this Court has carefully crafted and faithfully followed.

CONCLUSION

As established above, the trial court property granted summary judgment in favor of these respondents, which decision was properly affirmed by the Court of Appeals. Moreover, resolution of this matter will have no immediate importance or significance beyond the particular facts of this case and the specific parties to it.

For these reasons, these respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Marie E. Cully.

Respectfully submitted,

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